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33 **UNITED STATES DISTRICT COURT**
34
35 **NORTHERN DISTRICT OF CALIFORNIA**
36
37 **SAN FRANCISCO DIVISION**

38 MAXIMILIAN KLEIN, et al., on behalf of
39 themselves and all others similarly situated,

40 Plaintiffs,

41 v.

42 META PLATFORMS, INC., a Delaware
43 Corporation,

44 Defendant.

45 Case No. 3:20-cv-08570-JD

46 **DEFENDANT META PLATFORMS,
47 INC.'S NOTICE OF MOTION AND
48 MOTION TO EXCLUDE EXPERT
49 TESTIMONY AND OPINIONS OF
50 KEVIN KREITZMAN**

51 Hearing Date: June 20, 2024

52 Time: 10:00 a.m.

53 Judge: Hon. James Donato

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PUBLIC REDACTED VERSION**NOTICE OF MOTION AND MOTION**

1 PLEASE TAKE NOTICE that on June 20, 2024, at 10:00 a.m., Defendant Meta Platforms,
 2 Inc. will move the Court for an order granting Meta's Motion to Exclude the Expert Testimony
 3 and Opinions of Advertiser Plaintiffs' putative expert Kevin Kreitzman. Meta's motion is based
 4 on this Notice of Motion, the supporting Memorandum of Points and Authorities, and the
 5 Declaration of David Gringer filed herewith, along with the accompanying exhibits.

6 Pursuant to Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny, Meta respectfully requests that the Court exclude the
 7 testimony of Kevin Kreitzman in full.

MEMORANDUM OF POINTS AND AUTHORITIES**INTRODUCTION**

12 Advertisers' overcharge case hinges on the idea that Meta's customers paid more for social
 13 advertising than they would have without the conduct challenged in this litigation. Kevin
 14 Kreitzman's opinions serve as the lynchpin of that theory. But rather than analyzing the prices
 15 Meta charged for ads, Kreitzman compares Meta's *profits* with a cherry-picked group of just three
 16 "yardstick" companies. That approach is junk science for at least three reasons. First, the approach
 17 could only conceivably be informative with a rigorous and sound approach to identify the
 18 yardsticks. Kreitzman's arbitrary and random process is the opposite. Second, relatively high
 19 profits can—and often do—exist for reasons other than supracompetitive prices. Kreitzman never
 20 controls for any of these reasons. Third, even if high prices were an explanation for high profits,
 21 Kreitzman's comparison of profits alone cannot tell us anything about whether the profits are
 22 because of anticompetitive conduct, as opposed to market power earned through competition on
 23 the merits.

24 Kreitzman's approach is virtually unchanged since the class certification stage, where Meta
 25 also challenged the methodology and opinions based on it. *See* Dkt. 662 (Meta's prior *Daubert*
 26 motion directed at the yardstick study). The instant motion raises arguments that are largely
 27 identical to those raised in Meta's prior *Daubert* motion. If the Court has already granted Meta's
 28 class certification *Daubert* challenge to the Kreitzman-Williams yardstick study when it reaches

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1 this motion, it need not consider this independently. If the Court has not reached or has denied
 2 Meta's challenge to the study at the class certification stage, Meta presents additional evidence
 3 below.

4 Critically, the yardstick firms and selection criteria remain the same at the merits stage as
 5 they did at class certification. One of the "yardsticks" is a small Polish company, [REDACTED]
 6 that sells online advertising along with tourist packages, architectural plans, and cars. Another is a
 7 microblogging site, [REDACTED] that primarily operates in China. The third is [REDACTED] Ex. 1, Kreitzman
 8 Merits Rep. ¶¶35-55.¹ Using the weighted average of the profit rates of these three supposed
 9 comparators as a benchmark, Kreitzman calculates Meta's supposed excess profits and
 10 Advertisers' other expert, Michael Williams, then attributes those excess profits to
 11 supracompetitive pricing, which he in turn attributes entirely to the challenged conduct—even as
 12 both experts admit numerous other factors could explain excess profits. Kreitzman includes no
 13 controls for any other causes of Meta's profitability and makes no attempt to tie the profits Meta
 14 earns to the challenged conduct. Although this methodology is riddled with problems, this motion
 15 focuses on two that are so significant as to render the methodology manifestly unreliable when
 16 used as a tool to calculate an overcharge in advertising prices.

17 *First*, the Kreitzman-Williams study cannot show that the pricing of any Meta
 18 advertisement (let alone all advertisements) is attributable to anticompetitive conduct because, [REDACTED]
 19 [REDACTED], there are many factors, unrelated to pricing or
 20 anticompetitive conduct, that can cause a firm to maintain high profits. Those include non-price
 21 factors such as costs and output. But even where high profits stem from prices, those prices can
 22 also reflect factors unrelated to anticompetitive conduct, like product quality, management quality,
 23 and human capital, among others. Neither expert makes any effort to account for such factors.

24 *Second*, Kreitzman and Williams's selection of supposed "yardstick" firms is based on a
 25 set of criteria that is the expert-witness equivalent of throwing darts at a wall. The criteria omit
 26 nearly all the features usually relied on to assess firms' comparability. As for the criteria that were
 27

28 ¹ Unless otherwise noted, 'Ex.' citations reference exhibits to the Gringer Declaration filed
 herewith, emphasis is added, and objections are omitted for deposition citations.

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1 used, Kreitzman concedes that several of them were chosen not to identify genuinely comparable
 2 firms, but instead for the sake of convenience. Ultimately, all six criteria are ones that Kreitzman
 3 or Williams (or both) admitted either say nothing about comparability, or are, at best, based on
 4 their *ipse dixit*. Unsurprisingly, this lack of rigor produces unreliable results, and it should be
 5 rejected.

BACKGROUND

7 Advertisers submitted Kreitzman's report to establish common injury and identify the
 8 damages attributable to the higher prices they claim that the conduct at issue in this litigation
 9 permitted Meta to charge. Kreitzman acknowledged in his merits-stage deposition that [REDACTED]

10 [REDACTED]. See [REDACTED].

11 Ex. 2, Kreitzman Merits Tr. 17:17-24 ([REDACTED]
 12 [REDACTED]
 13 [REDACTED]); *id.* at 15:9-17 ([REDACTED]
 14 [REDACTED]). Meta has previously
 15 described that method, *see* Dkt. 662, and summarizes it again here for the Court's convenience.

16 Attempting to provide the groundwork for establishing injury and damages, Kreitzman
 17 compares what he claims is the economic profit rate (EPR) for Meta's advertising business against
 18 his calculation of the weighted average EPR for what he claims is a set of three "yardstick" firms—
 19 [REDACTED]. Ex. 1, Kreitzman Merits Rep. ¶¶35-55.

20 Kreitzman lists six criteria that he used to select his three yardstick firms. *Id.* ¶35. The criteria are
 21 that the company (1) [REDACTED] (2) [REDACTED]

22 [REDACTED] (3) [REDACTED]

23 [REDACTED] (4) [REDACTED]

24 [REDACTED] (5) [REDACTED]

25 [REDACTED] and (6) [REDACTED]
 26 [REDACTED] *Id.* Thus, companies like Amazon and Microsoft that vigorously compete
 27 against Meta to sell advertisements were not selected as benchmarks.

28 Next, Kreitzman proposes a hypothetical reduction in advertising revenue that would have

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1 lowered Meta’s profit rate to match the yardstick average. *Id.* ¶¶11-12, 61-62. The reduction he
 2 offers is a [REDACTED] decrease in Meta’s advertising revenue—or [REDACTED]. *Id.* Kreitzman does not
 3 analyze what revenue Meta would have earned in a but-for world without the challenged conduct.
 4 He does not analyze whether, in a world where Meta *did* earn lower profits, that reduction would
 5 have flowed from a revenue decrease or some other cause (like cost increases). He does not analyze
 6 why Meta’s alleged EPR is higher than the yardstick firms’ or isolate how much (if any) of that
 7 profitability may be due to the challenged conduct versus other factors.

8 Neither does Williams. Instead, Williams treats Kreitzman’s calculations as “[REDACTED]
 9 [REDACTED]
 10 [REDACTED].” Ex. 3, Williams Merits Rep.
 11 ¶355. Premised on this understanding, Williams relied on Kreitzman’s calculations to [REDACTED]
 12 [REDACTED]
 13 [REDACTED]” *Id.* ¶363.

14 **ARGUMENT**

15 Despite calling their approach a “yardstick” model, the Kreitzman-Williams study is
 16 anything but. Kreitzman and Williams’ approach suffers from two independently fatal flaws that
 17 courts have found render yardstick analyses unreliable and inadmissible. First, the study assumes
 18 that the difference between Meta’s EPR and the weighted average EPR of the yardstick firms is
 19 wholly attributable to price increases caused by the challenged conduct, without accounting for
 20 salient variables that both experts acknowledge affected Meta’s profitability. Second, the study
 21 employs arbitrary criteria to select the yardsticks, yielding a facially inappropriate result. The study
 22 is junk science, and its results confirm that.

23 **I. KREITZMAN ASSUMES, WITHOUT ANY BASIS, THAT META’S PROFITS ARE DUE TO
 24 ANTICOMPETITIVE CONDUCT**

25 **A. The Experts Fail To Control For Non-Price And Lawful Factors Affecting
 26 Profits**

27 The “most important[]” requirement for a “yardstick methodology” is “to control for any
 28 factors that might have influenced [a firm’s] profit performance that are competitively neutral or
 even procompetitive.” Areeda & Hovenkamp, *Antitrust Law* ¶397 (2023); Faigman et al., 5 Mod.

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1 Sci. Evid. § 43:35 (2022-2023 ed.) (when a “yardstick benchmark is employed, effects on the
 2 prices paid by plaintiffs … caused by factors other than the alleged wrongdoing must be taken into
 3 account”). If a study fails to do so, it cannot possibly show that any difference is “attributable to
 4 the defendant’s misconduct” and is therefore inadmissible. *Blue Cross & Blue Shield United of*
 5 *Wis. v. Marshfield Clinic*, 152 F.3d 588, 592-93 (7th Cir. 1998) (Posner, J.) (“BCBS”); *Kentucky*
 6 *v. Marathon Petrol. Co.*, 464 F. Supp. 3d 880, 894 (W.D. Ky. 2020) (same).

7 Disregarding these basic tenets of reliable yardstick studies, Kreitzman simply observes
 8 that “[REDACTED],” and then
 9 calculates [REDACTED]

10 [REDACTED] Ex. 1, Kreitzman Merits Rep. ¶¶61-62. He concededly
 11 [REDACTED] Ex. 2, Kreitzman Merits Tr. 13:12-14.
 12 And even though his analysis assumes that Meta’s profits would be brought in line with the
 13 yardsticks entirely via a reduction in revenue, Kreitzman acknowledged [REDACTED]
 14 [REDACTED] *Id.* at 85:12-18. Yet notwithstanding
 15 these oversights, Williams then asserts that [REDACTED]
 16 [REDACTED]

17 [REDACTED] Ex. 3, Williams Merits Rep. ¶142. Williams,
 18 like Kreitzman, offers no further analysis tying Meta’s profits to its advertising revenue or to the
 19 challenged conduct in particular. Instead, he too simply attributes “all of [Meta’s] reduction in
 20 economics profits to a … [p]rice decrease.” Ex. 4, Williams Merits Tr. 280:10-20.

21 The Kreitzman-Williams study fails as a threshold matter because it does not control for
 22 any of the litany of factors besides the challenged conduct that both experts acknowledge could
 23 have caused Meta’s EPRs to exceed those of the yardstick firms. For one thing, Kreitzman
 24 admitted (as he must) that [REDACTED]

25 [REDACTED] *See* Ex. 2, Kreitzman Merits Tr. 87:13-89:21 ([REDACTED]
 26 [REDACTED]
 27 [REDACTED] regardless of
 28 whether high profits are caused by prices, costs, or output, those “high profits or net positive profits

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1 can exist even for years for reasons unrelated to anticompetitive conduct.” Ex. 5, Kreitzman CC
2 Tr. 36:15-19; [REDACTED]
3 [REDACTED] These reasons
4 include at least product quality, product innovation, the quality of a firm’s management, and
5 human capital. Ex. 5, Kreitzman CC Tr. 37:18-23, 38:6-15, 39:24-42:19; *see also* Ex. 6, Williams
6 CC Tr. 70:12-72:5.

7 Yet by Kreitzman’s own admission, his yardstick study does not account or control for any
8 of those factors. Kreitzman explained that he [REDACTED]
9 [REDACTED]

10 [REDACTED] Ex. 2, Kreitzman Merits Tr. 152:1-5. Consistent with that, Kreitzman admitted that his
11 study identifies no reason Meta’s profit rate could not come to match the yardsticks’ through an
12 increase in costs, instead of a reduction in prices. *See* Ex. 5, Kreitzman CC Tr. 68:19-69:4 (“Q.
13 [I]n evaluating the difference between the profits that you calculated for Meta and for your
14 yardstick firms, is it your opinion that revenue reduction is the only way that Meta’s profits could
15 be brought in line with the yardstick firms? A. No, I don’t believe that I’ve offered that opinion.”);
16 *id.* at 69:16-20 (“Q. So the answer to my question is yes, Meta’s costs could be increased to get to
17 the level of profitability of the yardstick firms; right? A. Yes. Again, profits are an interaction of
18 these different things, yes.”). And he likewise admitted that none of his yardstick selection criteria
19 had anything to do with product quality, product innovation, management quality, or human
20 capital. *Id.* at 44:15-17 (these factors “were not part of [his] six selection criteria”); *id.* at 46:12-
21 47:1 (these factors were “not something that [he] considered or adjusted for” in selecting his
22 yardstick firms).

23 Kreitzman also agreed that [REDACTED]
24 [REDACTED]

25 [REDACTED] Ex. 2, Kreitzman Merits Tr. 71:10-72:4. That reflects a fundamental
26 misunderstanding of the scope of Williams’s opinions. Williams testified that [REDACTED]
27 [REDACTED]
28 [REDACTED]

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1 [REDACTED] Ex. 6, Williams CC Tr. 186:8-187:13. Rather, he agreed that “[t]he reason [he]
 2 would expect Meta’s prices to look like the prices of the yardstick firms in the but-for world is
 3 because [he] viewe[d] them as comparable, except for the fact that Meta maintained its monopoly
 4 via the challenged conduct.” Ex. 4, Williams Merits Tr. 163:19-165:1. That is, Williams assumed
 5 that Kreitzman built into the yardstick selection process a way of controlling for differences in
 6 product quality, innovation, human capital, and management quality—while Kreitzman assumed
 7 that Williams was handling those controls. Each assumed that another expert would pick up the
 8 slack of controlling for these other factors, but no one did.

9 The resulting failure to so much as *attempt* to control for factors other than anticompetitive
 10 conduct affecting Meta’s profits renders the Kreitzman-Williams study unreliable and
 11 inadmissible. A yardstick study is “worthless” if it “attribute[s] the entire difference between the
 12 prices of” an antitrust defendant and the comparator firms to anticompetitive conduct without
 13 “correct[ing] for salient factors, not attributable to the defendant’s misconduct, that may have
 14 caused the harm of which the plaintiff is complaining.” *BCBS*, 152 F.3d at 593. “[S]imply
 15 assum[ing]—without further examination—that the difference in” prices (or profits, in this case)
 16 between firms “is due entirely to [the defendant’s] allegedly anticompetitive conduct” without
 17 “account[ing] for *any* other possible explanation(s) for this disparity” is “so incomplete as to be
 18 inadmissible as irrelevant.” *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 973, 975
 19 (C.D. Cal. 2012) (quoting *Bazemore v. Friday*, 478 U.S. 385, 400 n.10 (1986)).

20 **B. The Experts Fail To Distinguish Between Profits From Social Advertising And
 21 Profits From Non-Social Advertising**

22 Advertisers assert that the relevant market is the market for “social advertising.” Dkt. 643
 23 at 4; *see also* Ex. 3, Williams Merits Rep. ¶365. Social ads, they say, are those that “can be targeted
 24 based on social data contained in a social graph.” Dkt. 643 at 4; Ex. 3, Williams Merits Rep. ¶365;
 25 *see also* Ex. 6, Williams CC Tr. 244:18-24 [REDACTED]

26 [REDACTED] Those are the
 27 only ads Meta is claimed to monopolize. *See* Ex. 4, Williams Merits Tr. 176:9-14 (agreeing he has
 28 “not offered an opinion in this case in [his] reports that Facebook has monopoly power in any
 market other than the social advertising market”). So, they are the only ads affected by the

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1 challenged conduct, and the only ads for which the class may recover.

2 Advertisers' experts admit that not every advertisement sold on Meta was social, meaning
 3 that not all of Meta's advertising *profits* are from the allegedly monopolized market. *See*, Ex. 7,
 4 Fasser Tr. 97:8-12 (Advertisers' industry expert testifying that ads "placed on Facebook
 5 Marketplace that a user would encounter based on their entering of a search term ... constitute
 6 search advertising"); *id.* at 82:15-83:1 (testifying that ads purchased from Meta through the
 7 Facebook Audience Network were not "social advertisements" unless they were "placed on other
 8 social media networks"); Ex. 8, Gans Tr. 94:6-11 (agreeing that "ads that target purely on age and
 9 location" are not "ads that use data on social connections between users"). But neither Kreitzman
 10 nor Williams separates the revenue and profit attributable to *social* advertisements from that
 11 attributable to *other* advertisements Meta sells that are outside the alleged market. *See* Ex. 5,
 12 Kreitzman CC Tr. 248:22-24 (agreeing he "did not distinguish between social and nonsocial
 13 advertising" profits); Ex. 6, Williams CC Tr. 282:16-21 [REDACTED]

14 [REDACTED]. That—just like their failure to account for product
 15 quality, management quality, employee quality, innovation, or just about anything else—requires
 16 the Court to exercise its role as a gatekeeper and exclude their opinions. *BCBS*, 152 F.3d at 593
 17 (failure to "correct for salient factors, not attributable to the defendant's [alleged] misconduct,"
 18 requires exclusion of study).

19 **II. THE "YARDSTICK FIRMS" ARE NOT THE PRODUCT OF A RELIABLE METHODOLOGY**

20 **A. The Selection Criteria Are Junk Science**

21 "[T]he yardstick method requires a comparison of the" firm at issue "with one nearly as
 22 identical as possible." *Shannon v. Crowley*, 538 F. Supp. 476, 481 (N.D. Cal. 1981); Areeda ¶ 392f
 23 ("[O]ne must identify a firm that is truly comparable in order for the inferences drawn to be reliable
 24 rather than speculative."). Plaintiffs bear the burden of "demonstrat[ing] the reasonable similarity"
 25 of the defendant's business to the proposed comparators in the yardstick study. *Eleven Line, Inc.*
 26 *v. N. Tex. State Soccer Ass'n*, 213 F.3d 198, 208 (5th Cir. 2000). That involves considering whether
 27 the firms are comparable with respect to real-world factors like, for example, "geographical
 28 location," the "attractiveness of" their product offerings, the size and type of the markets they

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1 serve, and their “relative costs of operation.” *Id.*

2 The Kreitzman-Williams selection criteria ignore those real-world criteria. And that
 3 oversight shows in the list of firms the criteria produce: one of the firms is a relatively tiny Polish
 4 company that makes its money selling not only advertising but also tourist packages, architectural
 5 plans, and cars, and two of the firms operate primarily in dissimilar international markets (China
 6 and Poland). Indeed, other than [REDACTED] the list lacks a single company that anyone has ever
 7 mentioned in the same breath as Meta—no Twitter, no Microsoft, no TikTok, no Snapchat, no
 8 Apple, no Amazon, no Reddit—and Kreitzman admits that he and Williams did not even consider
 9 comparability of those firms (or any others) once one of their screening criteria filtered them out.
 10 See Ex. 5, Kreitzman CC Tr. 239:7-241:17.

11 The factors Kreitzman *does* rely on to produce his yardsticks do not ensure comparability.
 12 Consider each filter in turn.

13 *First*, Kreitzman limits the yardsticks to [REDACTED] He does so not because
 14 [REDACTED] are any more comparable to Meta than [REDACTED], but instead for convenience—
 15 because [REDACTED]
 16 [REDACTED] Ex. 1, Kreitzman Merits Rep. ¶35 n.1; *accord* Ex. 5,
 17 Kreitzman CC Tr. 70:10-15. But as Kreitzman acknowledged, that says nothing about
 18 comparability: “Q. Now, the ability to access the information, in other words, whether or not that
 19 information is reliably available because it’s a [REDACTED] or not reliably available because
 20 it’s a [REDACTED] that itself doesn’t say anything about the comparability of the firm to Meta;
 21 correct? A. That’s true, yes.” Ex. 5, Kreitzman CC Tr. 71:8-14. As a result, [REDACTED]
 22 [REDACTED] “it’s possible that there are privately held firms that are at least as comparable
 23 or more comparable to Meta than the yardstick firms that [Kreitzman] identified.” *Id.* at 76:23-
 24 77:7; [REDACTED]. The fact that Kreitzman chose this filter to
 25 ensure he had adequate information to perform his calculations does not itself require exclusion of
 26 the yardstick study. But it does make clear that this first filter, at least, does no work to help the
 27 yardstick study comply with the law’s requirement that a yardstick study select a comparable set
 28 of firms—if anything, the filter excludes potentially superior comparators to the chosen yardsticks.

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1 Since this filter does nothing to ensure comparability, one of the others must do so for the study to
 2 be reliable—but not one actually does so.

3 *Second*, Kreitzman limits the yardsticks to those that [REDACTED] places in the category
 4 [REDACTED] That filter brings the set of comparable firms from 52,538 to just

5 347—eliminating 99% of possible comparators—and excludes brands with massive online
 6 advertising businesses (like Amazon, Microsoft, or Verizon). Despite the filter’s dramatic effect
 7 on his study results, Kreitzman admitted that he does not “actually know what criteria [REDACTED]

8 used to decide who goes into that category,” and that “some of the firms in the category don’t meet
 9 at least one part of the definition [REDACTED] provided.” Ex. 5, Kreitzman CC Tr. 81:19-23, 87:16-20.

10 Remarkably, Williams acknowledged that [REDACTED], and
 11 yet he and Kreitzman used it as the first filter for comparable firms. *See* Ex. 6, Williams CC Tr.
 12 214:16-215:5. Both experts, when pressed to nonetheless justify the filter, testified that [REDACTED]

13 [REDACTED]
 14 [REDACTED] *Id.* at 209:11-210:24; Ex.
 15 5, Kreitzman CC Tr. 80:9-12 (“I would focus on what’s included in the industry category”).

16 Exactly. Application of this filter excluded firms that *are* comparable while leaving those that are
 17 not. Moreover, despite the conceded unreliability of [REDACTED], Kreitzman

18 relied on those very descriptions to exclude every single other industry segment (other than
 19 [REDACTED] without actually “look[ing] at the companies in other segments” to

20 assess their comparability to Meta. Ex. 5, Kreitzman CC Tr. 88:7-15. As a result—and as
 21 Kreitzman admitted—he does not know whether other segments contained equally or more
 22 comparable firms than the yardsticks he picked. *Id.* at 85:19-86:3, 89:18-90:5. He did, at least,
 23 know that this filter excluded well-known advertising businesses within Microsoft (LinkedIn),
 24 Verizon (Yahoo), and Amazon.² In an emerging pattern, then, filter number two does nothing to

25 _____
 26 ² Kreitzman claims that [REDACTED]

27 [REDACTED] Ex. 1,
 28 Kreitzman Merits Rep. ¶17. That, of course, says nothing about companies like Microsoft and
 Verizon. But in any event, [REDACTED]

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1 produce a comparable set of firms, and excludes potentially superior comparators to the yardsticks.

2 *Third*, Kreitzman limited the yardsticks to firms [REDACTED]

3 [REDACTED]. His goal was not to identify comparable firms, but instead
4 do the opposite and “cast a very, very wide net to pick up … the highest possible number” of firms.

5 *Id.* at 120:25-121:10. With a justification so unmoored from comparability, it is no wonder that
6 the filter rests on an arbitrary numerical threshold. Kreitzman testified that had he selected a
7 marginally higher cutoff than [REDACTED]—the lowest-EPR firm in the set—would
8 not have made the cut. *Id.* at 128:5-12. Yet when challenged to justify the cutoff he chose,
9 Kreitzman said only that it was [REDACTED] Ex. 9, Kreitzman CC Rebuttal ¶31.
10 That is code for “*ipse dixit*” and is insufficient to demonstrate that he identified a “reasonable
11 facsimile” or “benchmark” firm. *See In re Google Play Store Antitrust Litig.*, 2023 WL 5532128,
12 at *9 (N.D. Cal. Aug. 28, 2023) (Donato, J.). This filter, then, once again failed to reliably select
13 for comparable firms.

14 *Fourth*, Kreitzman applied a similar filter with respect to [REDACTED]: any
15 firm that [REDACTED] was rejected by this
16 filter and thus necessarily deemed non-comparable by Kreitzman and Williams. That filter is
17 arbitrary just like the [REDACTED] filter as its numerical threshold finds no support beyond Kreitzman’s
18 *ipse dixit*. Tellingly, had the cutoff been even [REDACTED] would have been excluded.
19 *See* Ex. 1, Kreitzman Merits Rep. ¶35 & fig.12. This filter’s purpose was also to “cast a very wide
20 net,” as evidenced by [REDACTED] barely scraping through. *See* Ex. 5, Kreitzman CC Tr.
21 131:9-14 (if the “cutoff for market cap had been almost anything other than one one-thousandth,
22 [REDACTED] would have fallen out”). But the [REDACTED] filter also has an *additional*
23 deficiency, beyond those it shares with the [REDACTED] filter. Kreitzman calculated its cutoff by
24 guesstimating that [REDACTED] But remarkably,
25 Kreitzman did not “do any calculation based on Meta’s financial data” to arrive at that figure; it
26 was a “judgment-based assumption.” *Id.* at 135:9-17. Left fatally unexplained—again—is how or
27

28 [REDACTED] He says nothing at all about what a comparison between
Meta’s and Amazon’s *advertising* businesses would show about Meta’s advertising profits.

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1 why Kreitzman exercised his judgment in this fashion.

2 *Fifth*, Kreitzman eliminated any firm that [REDACTED]

3 [REDACTED]. This filter is likewise an outcome-oriented choice justifiable only by *ipse dixit*.

4 Kreitzman's report just asserts that companies [REDACTED]

5 [REDACTED] Ex. 1,

6 Kreitzman Merits Rep. ¶35 n.47. Perhaps recognizing the infirmity of that explanation, he adds

7 that the filter really “[REDACTED]” by “[REDACTED].” Ex. 10,

8 Kreitzman Merits Rebuttal ¶15. But his own testimony reveals that he was wrong: as he agreed,

9 “companies can have negative income before delivering very significant profits,” meaning there

10 is no necessary connection between [REDACTED] and a low profit rate over the class

11 period. Ex. 5, Kreitzman CC Tr. 157:12-15. And in any event, it hardly excuses a significant flaw

12 in one's analysis to say, “no harm, no foul.” Especially where the application of the filter confirms

13 that it, at a minimum, calls into question—if not in fact harms—the reliability of the methodology.

14 This screening criteria was the one that filtered out *Twitter* as a comparator to Meta.

15 *Sixth*, Kreitzman limits the yardsticks to companies [REDACTED]

16 [REDACTED]. The primary purpose of this filter was, by Kreitzman's own admission, not to

17 identify comparable firms, but rather to [REDACTED]

18 [REDACTED] Ex. 9, Kreitzman CC Rebuttal ¶36; Ex. 5, Kreitzman CC Tr.

19 173:10-14 (purpose was to “have adequate data”). But Kreitzman did not even consider whether

20 any particular firm's ad revenue could be broken out from its non-ads business, as he did for Meta

21 and [REDACTED] *See, e.g.*, Ex. 5, Kreitzman CC Tr. 97:5-11, 98:17-22, 100:2-5. The result is that

22 Kreitzman has no idea whether his sixth filter filtered out firms with ads businesses that were at

23 least—or more—comparable than the three “yardstick” firms, because he did not even look:

24 Q. So it's possible that there were firms that had ads businesses that were at least,
25 if not more comparable than your yardstick firms that were screened out as a
result of criteria number 6; right?

26 A. Yeah. Again, it could've -- it's possible that this segment by itself would have
been a comparable and comparable to Meta's business.

27 Q. And that's not something that you evaluated as part of your analysis; correct?

28 A. That's correct.

Id. at 176:1-12.

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1 What's more, this filter turns almost entirely on a judgment call Kreitzman is unqualified
 2 to make. As Kreitzman acknowledged, applying this filter required him "to figure out what
 3 segments" of each firm "should be counted as advertising revenue and not." *Id.* at 176:17-23. Yet
 4 segments that included advertising revenue were excluded if he believed their ads were "very
 5 different" from the "targeted ads" Meta offers. *Id.* at 192:8-13. Even though Kreitzman admits he
 6 is not an expert in advertising—he has never worked in the industry and knows little of Meta's
 7 advertising products—he "ma[de] that judgment [him]self" without "consult[ing] with *anyone* that
 8 has expertise in the advertising industry." *Id.* at 196:12-19.

9 In sum, Kreitzman's testimony amply establishes that several of his selection criteria do
 10 not even attempt to identify comparable firms, and that the others cannot possibly do so in a reliable
 11 fashion. In the end, Kreitzman's selection criteria did *nothing* to select for comparable firms—they
 12 instead excluded scores of comparable firms. Kreitzman's opinions should therefore be excluded.

13 **B. The Final Set Of Yardsticks Is The Clear Product Of Junk Science**

14 Stepping back from the specific selection criteria applied, the final trio of yardstick firms—
 15 [REDACTED]—confirm the unreliability of the selection process.

16 Turning first to [REDACTED], neither [REDACTED] nor Kreitzman was aware of anyone—
 17 any document or person—who has ever described [REDACTED] as comparable to Meta. [REDACTED]
 18 [REDACTED] Ex. 5, Kreitzman CC Tr. 236:22-237:4. The company is a tiny
 19 fraction of Meta's size and its businesses include tourist packages, architectural designs, TV ads,
 20 and car sales. Indeed, revenue data from [REDACTED] strongly suggests that it does not even
 21 clear Kreitzman's flawed criteria. It began breaking out the size of its advertising segment in 2021,
 22 and its advertising revenue that year—when *combined* with revenue from subscription services—
 23 constituted only 63% of its total revenue, with the rest attributable to such diverse offerings as the
 24 sale of tourist packages and consumer financial products. [REDACTED]

25 [REDACTED] In the next year, the ads-and-subscriptions combination
 26 constituted only 58% of revenue. *Id.* There is no basis to infer that the share attributable to
 27 advertising was some 20 points higher ([REDACTED]
 28 [REDACTED]) for 2016-2020. Indeed, Kreitzman's class-stage report asserted that [REDACTED]

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1 [REDACTED] but, when confronted, he admitted he was wrong. Ex.
 2 5, Kreitzman CC Tr. 222:6-223:11. He could not reconcile those contradictory facts, nor offer any
 3 basis for concluding that [REDACTED]:

4 Q. I'm asking you to confirm that you don't know whether or not [REDACTED]
 5 had [REDACTED] during the class period, because you don't know how much these other sources contributed
 6 to its revenue; isn't that right?

7 A. Again, I don't know—there was no quantification associated with them, so I
 8 cannot say, you know, what they were or if they were material or not.

9 [REDACTED] Yet, incredibly, his merits report doubled down—without support—on the
 10 debunked claim that [REDACTED]. Ex. 1, Kreitzman Merits
 11 Rep. ¶49 n.73.³ This alone reveals that Kreitzman's set of comparator firms is so unreliable as to
 12 warrant exclusion. *See Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 268 (2d Cir.
 13 2002) (excluding expert opinion for “fail[ing] to apply his own methodology reliably”).

14 Next, consider [REDACTED] As Williams acknowledges, a yardstick study must compare [REDACTED]
 15 [REDACTED] [REDACTED] Ex. 3,

16 Williams Merits Rep. ¶329 (quoting ABA Antitrust L. Sec., *Proving Antitrust Damages: Legal*
 17 *and Economic Issues* Ch. 4, § C (3d ed. 2017)); *see also* Ex. 6, Williams CC Tr. 198:10-25. But
 18 [REDACTED] is not merely affected by the alleged anticompetitive conduct in this case; it is allegedly a
 19 [REDACTED]. *See Am. Compl.*, Dkt. 391 ¶¶ [REDACTED] (challenging Meta's alleged [REDACTED]
 20 [REDACTED] too, ought to have been excluded under
 21 Kreitzman's and Williams's own description of their approach. *See Persian Gulf v. BP W. Coast*
 22 *Prods.*, 632 F. Supp. 3d 1108, 1166 (S.D. Cal. 2022) (“Williams' methodology disregarded the
 23 basic econometric principle of selecting a benchmark … that is reasonably free of misconduct.”).

24 That leaves only [REDACTED] is, again, a Chinese microblogging site that Advertisers'
 25 experts have failed to establish has any relevant similarities to Meta. *See Eleven Line*, 213 F.3d at
 26 208. And in any event, [REDACTED] average EPR is *higher* than Meta's—it offers no proof Meta

27
 28 ³ Like his class report, Kreitzman's merits report cites [REDACTED]
 [REDACTED] as support for this figure. But the cited pages say nothing of the sort. [REDACTED]

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1 obtained an anticompetitive profit. Ex. 1, Kreitzman Merits Rep. ¶59 fig.24. That means that, in
2 reality, the yardstick study can reliably show neither damages nor antitrust impact, and it should
3 therefore be excluded.

4 **CONCLUSION**

5 The Court should exclude the unreliable Kreitzman-Williams “yardstick” study by
6 excluding the testimony of Kreitzman in full.

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1 Dated: April 5, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

2 I hereby certify that on this 5th day of April, 2024, I electronically transmitted the public
3 redacted version of the foregoing document to the Clerk's Office using the CM/ECF System and
4 caused the version of the foregoing document filed under seal to be transmitted to counsel of record
5 by email.

By: /s/ Sonal N. Mehta
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